

14-1010-bk
Crest One SpA v. TPG Troy

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3
4

5 August Term, 2014
6

7 (Argued: February 19, 2015
8

Decided: July 14, 2015)

9 Docket No. 14-1010-bk, 14-1037-bk(con), 14-1062-bk(con)
10

11
12
13 IN THE MATTER OF: TPG TROY, LLC,
14

15 *Debtor,*
16

17
18 CREST ONE SpA, LANSLOWNE CAPITAL SA,
19 SPQR CAPITAL (CAYMAN) LTD.,
20

21 *Appellants,*
22

23 v.
24

25 TPG TROY, LLC,
26

27 *Appellee,*
28

29 T3 TROY, LLC,
30

31 *Consolidated-Appellee.*
32
33
34

1 Before: WINTER, POOLER, SACK, *Circuit Judges*.

2
3 Crest One SpA, Lansdowne Capital SA, and SPQR Capital (Cayman) Ltd.
4 (together, the “Creditors”) appeal from the March 4, 2014 decision and the March
5 6, 2014 order of the United States District Court for the Southern District of New
6 York (Torres, J.): (1) affirming the May 9, 2013 decision of the United States
7 Bankruptcy Court for the Southern District of New York (Glenn, B.J.) dismissing
8 the Chapter 7 involuntary bankruptcy petitions filed by the Creditors against
9 TPG Troy, LLC and T3 Troy, LLC (together, the “Troy Entities”); (2) denying the
10 Creditors’ motion to withdraw the reference to bankruptcy court; and (3)
11 affirming the July 18, 2013 opinion by the same bankruptcy court awarding the
12 Troy Entities \$513,427.16 in attorneys’ fees and costs pursuant to 11 U.S.C. §
13 303(i)(1). Finding no error in the decisions below, we affirm.

14 Affirmed.

15
16 JARED B. STAMELL, Stamell & Schager, LLP (Andrew
17 R. Goldenberg, *on the brief*), New York, N.Y., *for*
18 *Appellants Crest One SpA, Lansdowne Capital SA, and*
19 *SPQR Capital (Cayman) Ltd.*

20
21 MICHELE L. ANGELL, Kasowitz, Benson, Torres &
22 Friedman LLP (Paul M. O’Connor III; Andrew K. Glenn,

1 *on the brief*), New York, N.Y., for Appellees TPG Troy
2 LLC, and T3 Troy LLC.

3
4 POOLER, Circuit Judge:

5 Crest One SpA, Lansdowne Capital SA, and SPQR Capital (Cayman) Ltd.
6 (together, the “Creditors”) appeal from the March 4, 2014 decision and the March
7 6, 2014 order of the United States District Court for the Southern District of New
8 York (Torres, J.): (1) affirming the May 9, 2013 decision of the United States
9 Bankruptcy Court for the Southern District of New York (Glenn, B.J.) dismissing
10 the Chapter 7 involuntary bankruptcy petitions filed by the Creditors against
11 TPG Troy, LLC and T3 Troy, LLC (together, the “Troy Entities”); (2) denying the
12 Creditors’ motion to withdraw the reference to bankruptcy court; and (3)
13 affirming the July 18, 2013 opinion by the same bankruptcy court awarding the
14 Troy Entities \$513,427.16 in attorneys’ fees and costs pursuant to 11 U.S.C. §
15 303(i)(1). Finding no error in the decisions of the courts below, we affirm.

16 **BACKGROUND**

17 This case is one of many commenced by the Creditors and others to
18 recover losses incurred when subsidiaries of Hellas Telecommunications, s.a.r.l.
19 defaulted on notes valued at roughly € 1.3 billion (the “Notes”). The Troy Entities

1 partially owned Hellas at the time the Notes were issued. The Troy Entities
2 maintain they did not issue or guarantee the Notes, and had sold their interest in
3 Hellas long before the default. Nevertheless, the Creditors and similarly
4 interested parties are engaged in a vigorous global litigation campaign to recover
5 their losses on the Notes from the Troy Entities and others.

6 At the time the involuntary bankruptcy petitions were filed, the Creditors
7 were directly or indirectly involved in multiple lawsuits to recover on the Notes,
8 including: (1) four actions in New York State Supreme Court seeking to recover
9 on the Notes from the Hellas companies and other defendants, including the
10 Troy Entities; (2) two actions in California and two in Delaware, all subsequently
11 dismissed pending a decision on the New York State Supreme Court actions; (3)
12 three actions in the Southern District of New York , two of which were dismissed
13 for lack of standing; and (4) two European actions seeking to recover on the
14 Notes.

15 On December 21, 2012, the Creditors filed involuntary petitions against the
16 Troy Entities in bankruptcy court pursuant to 11 U.S.C. § 303, asserting that the
17 Troy Entities were liable for the debts of the Hellas companies based on an alter
18 ego theory. The Troy Entities moved to dismiss the petitions. The bankruptcy

1 court dismissed the petitions on two grounds. First, the bankruptcy court
2 concluded that dismissal was appropriate under 11 U.S.C. § 303(b)(1). *In re TPG*
3 *Troy, LLC*, 492 B.R. 150, 159 (Bankr. S.D.N.Y. 2013). The court found there was a
4 bona fide dispute as to whether a debt was owed, based on the “plethora of
5 ongoing litigation,” and the factual showing made by the Troy Entities as to
6 whether they engaged in the transaction at issue. *Id.* at 160. Second, in the
7 alternative, the bankruptcy court concluded abstention pursuant to 11 U.S.C. §
8 305(a)(1) was proper, given that litigation regarding the same transaction was
9 already in progress in multiple other forums, and the primary issues implicated
10 state, not federal, law. *Id.* at 160-61.

11 After the bankruptcy court dismissed the involuntary petitions, the Troy
12 Entities moved to recover attorneys’ fees, costs, and punitive damages pursuant
13 to 11 U.S.C. § 303(i). The bankruptcy court declined to award punitive damages,
14 but awarded the Troy Entities \$513,427.16 in attorneys’ fees and costs. *In re TPG*
15 *Troy, LLC*, Nos. 12-14965, 12-14966, 2013 WL 3789344, at *5 (Bankr. S.D.N.Y. July
16 18, 2013). The bankruptcy court found that “[b]ased on the totality of the
17 circumstances,” a fee award was appropriate, and that the fees and costs sought
18 were “reasonable under the circumstances.” *Id.* at *4. The bankruptcy court

1 declined to exercise its discretion to award punitive damages, finding that “[t]he
2 amount of attorneys’ fees and costs awarded by the Court in this case is very
3 substantial and will hopefully serve as a deterrent to similar misconduct in the
4 future.” *Id.* at *5.

5 The Creditors appealed the dismissal of the involuntary petitions and the
6 award of attorneys’ fees and costs to the district court. The district court affirmed
7 the bankruptcy court in full. This appeal followed. On appeal, the Creditors
8 argue that this Court lacks jurisdiction to consider their own appeal on the basis
9 of mootness, that they were entitled to a jury trial to determine whether
10 attorneys’ fees were warranted, and that bankruptcy court erred in awarding
11 attorneys’ fees.

12 DISCUSSION

13 Legal issues arising from potential mootness are reviewed de novo. *Adams*
14 *v. Zarnel (In re Zarnel)*, 619 F.3d 156, 161 (2d Cir. 2010). “The district court’s order
15 affirming the bankruptcy court is subject to plenary review. This court reviews
16 conclusions of law de novo, and findings of fact under a clearly erroneous
17 standard.” *Tudisco v. United States (In re Tudisco)*, 183 F.3d 133, 136 (2d Cir. 1999)
18 (internal citation, quotation marks and alteration omitted).

1 **I. Jurisdiction.**

2 On July 24, 2014, the Creditors moved to dismiss their own appeal for lack
3 of jurisdiction. The Creditors argued that because the district court affirmed both
4 the bankruptcy court's holdings on the existence of a bona fide dispute and
5 abstention, this appeal is moot because the district court's decision to abstain
6 under Section 305(a) is unreviewable by our Court pursuant to 11 U.S.C. § 305(c).
7 *See* 11 U.S.C. § 305(c) ("An order under subsection (a) of this section dismissing a
8 case or suspending all proceedings in a case, or a decision not so to dismiss or
9 suspend, is not reviewable by appeal or otherwise by the court of appeals . . . or
10 by the Supreme Court of the United States . . ."). The Creditors also sought to
11 vacate both the finding of a bona fide dispute and the award of attorneys' fees
12 and costs, on the ground that judgments that rely on moot issues should be
13 vacated. A panel of our Court denied the motion:

14 While Appellants are correct that this Court lacks
15 jurisdiction to review a bankruptcy court's decision to
16 abstain under 11 U.S.C. § 305(a), the Court does not lack
17 jurisdiction to review, at the very least, the bankruptcy
18 court's award of attorney's fees and costs.

19
20 *In re TPG Troy, LLC*, 14-1010, Dkt. No. 104 (2d Cir. Oct. 3, 2014) (internal citation
21 omitted).

1 Appellate courts have “an independent obligation to examine their own
2 jurisdiction.” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). “[T]he law of
3 the case doctrine does not deprive an appellate court of discretion to reconsider
4 its own prior rulings.” *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir.
5 1999). “[R]eexamination of a question regarding our jurisdiction is especially
6 important whenever there is reason to believe that it may be lacking.” *Id.* The
7 prohibition on the review of moot cases arises from “the Article III requirement
8 that federal courts adjudicate only ‘Cases’ and ‘Controversies.’” *Fox v. Bd. of Trs.*
9 *of State Univ. of N.Y.*, 42 F.3d 135, 139-40 (2d Cir. 1994). Because it goes to the
10 court’s subject matter jurisdiction, mootness may be raised at any stage in the
11 litigation. *Id.* at 140.

12 While our Court has yet to consider the precise issue of whether a finding
13 of abstention under Section 305(a) bars review of an attorneys’ fee award, it
14 addressed a similar issue in *Calabro v. Anika Halal Live Poultry Corp.*, 650 F.3d 163,
15 165 (2d Cir. 2011). There, we lacked appellate jurisdiction to review a district
16 court order remanding a case to state court pursuant to 28 U.S.C. § 1447(d). *Id.* at
17 165. However, our Court found it possessed jurisdiction to review the statutorily-
18 authorized award of attorney’s fees and costs made by the district court when it

1 found removal improper. *Id.* Similarly, here the attorneys' fees and costs at issue
2 are expressly authorized by Section 303(i), and there is no discernable basis for
3 treating this Court's jurisdiction differently. Further, other Circuits hold that a
4 money judgment for attorneys' fees and costs provides the court with a live
5 controversy capable of review even if the underlying issues raised by the appeal
6 are moot. *See Lynch v. Leis*, 382 F.3d 642, 646 (6th Cir. 2004) ("This appeal
7 concerns the propriety of the fee award, which presents a live case or controversy
8 between the parties: a monetary judgment against the defendants below
9 indubitably presents a live appeal."); *Ways v. City of Lincoln*, 274 F.3d 514, 517 n.3
10 (8th Cir. 2001) ("[S]ince the fee award is part of the appeal, the constitutionality of
11 the repealed ordinance needs to be addressed even if there were no prospect of
12 reinstatement of the original ordinance"); *C&H Nationwide, Inc. v. Norwest Bank*
13 *Texas NA*, 208 F.3d 490, 494 (5th Cir. 2000) ("[W]e can reach a now-moot
14 substantive issue when necessary to determine whether the district court
15 correctly awarded attorney's fees under state law.").

16 Finding we possess jurisdiction, we proceed with our review.

17 **II. Jury trial.**

18 Creditors next argue they were entitled to a jury trial on the issue of

1 awarding attorneys' fees and costs. Relying on *Stern v. Marshall*, 131 S. Ct. 2594
2 (2011), the Creditors further argue the bankruptcy court lacked the constitutional
3 authority to deem their jury demand waived. This argument is foreclosed by the
4 Supreme Court's opinion in *Wellness International Network v. Sharif*, 135 S. Ct. 1932
5 (2015). In *Wellness International*, the Supreme Court made clear that "Article III is
6 not violated when the parties knowingly and voluntarily consent to adjudication
7 by a bankruptcy judge." *Id.* at 1939. "[T]he key inquiry is whether the litigant or
8 counsel was made aware of the need for consent and the right to refuse it, and
9 still voluntarily appeared to try the case before the non-Article III adjudicator."
10 *Id.* at 1948 (internal quotation marks omitted).

11 We easily conclude that the Creditors "knowingly and voluntarily
12 consent[ed]" here. Our conclusion is based on the following colloquy between
13 the bankruptcy court and Creditors' counsel:

14 The Court: . . . let's assume no punitive damages.

15
16 Mr. Stamell: Fine.

17
18 The Court: Do you agree that your client is not entitled
19 to a jury trial on the issue of attorneys' fees and costs
20 under 303(i)(1)?

21
22 Mr. Stamell: May I answer it the following way, that

1 under those circumstances, we would not find it
2 necessary to argue the point of whether there is a jury –
3 a right to a jury.

4
5 The Court: So absent punitive damages, you agree that
6 your client either is not entitled or doesn't demand a
7 jury with respect to attorneys' fees and costs under
8 303(i)(1), correct?

9
10 Mr. Stamell: I don't want to waive the argument I'm not
11 entitled but we would not – we would be content to
12 consent to Your Honor determining the fees.

13
14 App'x at 1382:4-20. Like the courts below, we are persuaded that Creditors'
15 counsel consented to the bankruptcy court exercising its jurisdiction to award
16 attorneys' fees and costs pursuant to Section 303(i)(1) absent an award of
17 punitive damages. *See In re TPG Troy LLC*, 2013 WL 3789344, at * 1.

18 **III. Bona fide dispute.**

19 We review the conclusion that there is a bona fide dispute requiring
20 dismissal of the involuntary petitions solely for the purpose of deciding whether
21 there was a basis for the award of attorneys' fees and costs pursuant to Section
22 303(i).¹

¹ Section 303(i) authorizes an award of attorneys' fees when "the court dismisses a petition under this section other than on consent of all petitioners and the debtor." 11 U.S.C. § 303(i). As Section 303(i) does not explicitly reference abstention, the law is unsettled as to whether the statute provides for attorneys'

Section 303(b) of the Bankruptcy Code provides:

An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title- - -

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute . . .

11 U.S.C. § 303(b).

Courts apply an objective test in determining whether a bona fide dispute exists. *Key Mech. Inc. v. BDC 56 LLC (In re BDC 56 LLC)*, 330 F.3d 111, 117-18 (2d Cir. 2003), *abrogated on other grounds by In re Zarnel*, 619 F.3d 156 (2d Cir. 2010). A court must “determine whether there is an objective basis for either a factual or a legal dispute as to the validity of the debt.” *Id.* at 117 (internal quotation marks and alteration omitted). There is a bona fide dispute if “there is either a genuine

fees when an involuntary petition is dismissed on abstention grounds, with at least one court concluding that it does. *In re Macke Int’l Trade, Inc.*, 370 B.R. 236, 251 (B.A.P. 9th Cir. 2007) (“Importantly, the words ‘under this section’ immediately follow the word ‘petition,’ not ‘dismisses.’ All involuntary petitions are filed under § 303. Therefore, we read the statute such that the word ‘dismisses’ is modified only by the words ‘other than on consent of all petitioners and the debtor [etc.]’”). As the parties here rely on the existence of a bona fide dispute as the basis for its fee award, and as such fees are plainly authorized by the statute, we leave for another day the question of whether a dismissal on abstention grounds also supports a fee award.

1 issue of material fact that bears upon the debtor's liability or a meritorious
2 contention as to the application of law to undisputed facts." *Id.* "[T]he legislative
3 history makes it clear that Congress intended to disqualify a creditor whenever
4 there is any legitimate basis for the debtor not paying the debt, whether that basis
5 is factual or legal." *Id.* (internal quotation marks omitted). An involuntary
6 bankruptcy case cannot be the means of pressuring a debtor to pay a legitimately
7 disputed debt. *See id.* at 117-18.

8 Critically, while a court is called upon to determine the presence of a bona
9 fide dispute, it is not called on to resolve such dispute. *Id.* at 118. The petitioning
10 creditor bears the initial burden of coming forward with evidence to "establish a
11 prima facie case that no bona fide dispute exists. Once a prima facie case has been
12 established, the burden shifts to the debtor to demonstrate the existence of a bona
13 fide dispute." *Id.*

14 Here, Creditors challenge the finding of a bona fide dispute by arguing
15 that the bankruptcy court failed to examine the pending litigation to determine if
16 there was a bona fide dispute regarding alter ego liability. It is true that the mere
17 existence of pending litigation, here litigation relating to Troy's liability on the
18 Notes, or the filing of an answer is insufficient to establish the existence of a bona

1 fide dispute. *See In re Ross*, 63 B.R. 951, 960-61 (Bankr. S.D.N.Y. 1986). But, as the
2 bankruptcy court concluded, “pending litigation over a claim strongly suggests”
3 the existence of a bona fide dispute, even if it does not suffice to firmly establish
4 that existence. *In re TPG Troy, LLC*, 492 B.R. at 159-60 (collecting cases). It is,
5 however, clear that the bankruptcy court did not base its finding that a bona fide
6 dispute existed solely on the fact that the parties were engaged in other pending
7 litigation. Instead, the bankruptcy court found that in addition to the pending
8 litigation:

9 the Troy Entities “vigorously” dispute the factual
10 underpinnings of the Petitioners' alter ego claims. In
11 particular, the Troy Entities argue that they are not
12 liable under the contracts as alter egos of the Issuers
13 because no facts support alter ego liability; the N.Y. BCL
14 does not govern the conduct of foreign entities; the
15 Petitioners were made aware of and consented to the
16 transactions at issue; and the Troy Entities did not
17 engage in a fraudulent redemption transaction, as
18 evidenced by the fact that the Notes did not go into
19 default until three years after the Troy Entities sold their
20 shares . . . in a purported arms-length transaction.

21
22 *Id.* We find no error in the bankruptcy court's findings.

23 In addition, the Creditors argue that these questions of fact required a
24 hearing before resolution. We disagree. The job of the court when considering the

1 question “is to ascertain whether a dispute that is bona fide exists; the court is not
2 to actually resolve the dispute.” *In re BDC 56 LLC*, 330 F.3d at 118 (internal
3 quotation marks omitted). The bankruptcy court did not have to determine
4 whether the Troy Entities were actually alter egos of the Hellas companies before
5 dismissing the petitions. *See id.* at 119 n.5. (“Where, as here, the documentary
6 evidence establishes the existence of a bona fide dispute, however, a bankruptcy
7 court is not obligated to hold an evidentiary hearing. There may be occasions
8 when an evidentiary hearing would be helpful, but whether to hold one is within
9 the court’s discretion.”).

10 11 **IV. Attorneys’ fees.**

12 When an involuntary petition is dismissed, “there is a presumption that
13 costs and attorney’s fees will be awarded to the alleged debtor.” *In re Mountain*
14 *Dairies*, 372 B.R. 623, 637 (Bankr. S.D.N.Y. 2007) (internal quotation marks
15 omitted); *see also In re Skyworks Ventures, Inc.*, 431 B.R. 573, 576 (Bankr. D.N.J.
16 2010) (awarding attorney’s fees and costs is the “majority rule”). “[B]ad faith is
17 not a prerequisite to an award of costs and attorney’s fees under § 303(i)(1).”
18 *Lubow Mach. Co. v. Bayshore Wire Prods. Corp. (In re Bayshore Wire Prods. Corp.)*, 209
19 F.3d 100, 105 (2d Cir. 2000).

1 In awarding attorneys' fees and costs:

2 Most of the courts . . . have adopted a totality of the
3 circumstances test, in which certain factors are to be
4 considered. These include (1) the merits of the
5 involuntary petition; (2) the role of any improper
6 conduct on the part of the alleged debtor; (3) the
7 reasonableness of the actions taken by the petitioning
8 creditors; and (4) the motivation and objectives behind
9 the filing of the petition.

10
11 *In re Taub*, 438 B.R. 761, 775 (Bankr. E.D.N.Y. 2010) (internal quotation marks
12 omitted).

13 Here, the bankruptcy court decided to award fees "based on the totality of
14 the circumstances" because:

15 Petitioning Creditors have put forward no evidence to
16 rebut the presumption that the Troy Entities are entitled
17 to an award of attorneys' fees. All parties to the
18 involuntary petitions have been embroiled in countless
19 lawsuits over the same claims in forums spanning from
20 New York to Luxembourg. In addition, much of the
21 work that is the subject of the request for attorneys' fees
22 arises out of conduct initiated by Petitioning Creditors.
23 The Troy Entities' counsel had no choice but to defend
24 or respond to the various actions taken by Petitioning
25 Creditors throughout this dispute.

26
27 *In re TPG Troy, LLC*, 2013 WL 3789344, at *4.

